IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

PLAINTIFF STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "TYSON DEFENDANTS' MOTION TO COMPEL"

TABLE OF CONTENTS

TABLE OF AUTHORIES ii

I. Introduction 1

II. Background 4

III. Argument 10

A. The State's interrogatory answers contain the material facts sought or refer to documents containing those facts. 10

B. The State's Rule 33(d) elections are proper and responsive to the interrogatories at issue. 13

C. The Tyson Defendants' contention interrogatories requested identification of documents. 16

D. The State has properly identified the location of documents for which it has invoked Rule 33(d) in order to respond to interrogatories. 18

E. The State's document production indices meet the requirements of Rule 33(d) for specificity. 19

F. Tyson's assault on the work product doctrine is unfounded. 19

G. The number of interrogatories (including subparts) exceeds the number permitted by the Federal Rules and Local Rules and are therefore objectionable. 22

IV. Conclusion 23

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases

American Rockwool, Inc. v. Owens-Corning Fiberglass Corp., 109 F.R.D. 263 (E.D.N.C. 1985). 15

Bauer v. United States, 40 Fed. Cl. 469, 470 (1998) 4

Cardenas v. Prudential Insurance Company of America, 2003 WL 23101803, *3 (D. Minn. Dec. 9, 2003) 3

Equal Employment Opportunity Commission v Anchor Continental, Inc , 74 F.R.D. 523 (D.S.C. 1977) 15

Gierbolini Rosa v. Banco Popular de Puerto Rico, 171 F.R.D. 16, 17 (D.P.R. 1997) 4

Greely Publishing Co v. Hergert 2

Hiskett v. Wal-Mart Stores, Inc , 180 F.R.D. 403, 404 (D. Kan. 1998) 11

Rateree v. Rockett, 630 F.Supp. 763, 778 n. 26 (N.D. Ill. 1986). 2

State of Oklahoma v. Tyson Foods, Inc., ¶ 9.b. (DKT # 985) 3

Steil v Humana Kansas City, 197 F.R.D. 445, 447 (D. Kan. 2000) 12

West v. Burch, CIV-03-1019-T, W.D. Okla., Apr. 11, 2007 3

Statutes

Fed. R. Civ. P. 1 12

Fed. R. Civ. P. 33(d) 1, 5, 19

Fed. R. Civ. P. 7(b)(1) 10

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (the "State"), and respectfully requests that this Court deny the "Tyson Defendants' Motion to Compel" ("Tyson Motion") [DKT # 1019], for the reasons set forth below:

1. Contrary to the Tyson Defendants' contentions, the State's interrogatory responses are neither incomplete nor evasive.

2. The State's use of Fed. R. Civ. P. 33(d) in responding to these interrogatories has been wholly appropriate.

3. The State's work product objections are wholly appropriate.

4. The State's objection to the excessive number of interrogatories (including subparts) served by the Tyson Defendants is consistent with and supported by the Federal Rules and Local Rules.

I. Introduction

The Tyson Defendants persist in their Motion to Compel with their entirely unfounded effort to paint the State as being uncooperative and obstructive in the discovery process. *See* Tyson Motion, pp. 1-3. Nothing could be further from the truth. The fact of the matter is that the State's discovery responses have been fully consistent with the Federal Rules and complete. To date the State:

- has produced more than 300 boxes of documents responsive to the Poultry Integrator Defendants' discovery requests (such documents being *in addition* to its earlier voluminous voluntary productions and its identification of data available on the internet sites of state and federal agencies);

- has produced extensive indices of the documents being produced;

- has responded to 234 requests for production;
- has responded to 74 interrogatories;
- has provided a 72 page Rule 26(a) disclosure, which it later supplemented; and
- is preparing to turn over on February 1, 2007 approximately 8 boxes of documents and approximately 50 gigabytes of electronic stored information of sampling data.

A review of these materials by the Tyson Defendants would reveal to them the ample and compelling factual basis and support for the State's allegations.[1] Apparently choosing to simply ignore the substantive information contained in the materials provided to them, however, the Tyson Defendants have instead chosen to file a motion claiming deficiencies in the State's discovery responses that is long on generalities, short on specifics and, most importantly, without any basis whatsoever. *See, infra*, Section III.

Worse yet, the Tyson Defendants have now resorted to making groundless and unwarranted suggestions of spoliation of evidence and other misconduct by the Attorney General's office.[2] These sorts of suggestions by the Tyson Defendants must stop, and stop now.

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[1] The Tyson Defendants make reference to Rule 11. *See* Tyson Motion, p. 1 There is absolutely no basis for raising Rule 11 with respect to the State's case, and the Tyson Defendants are aware of this fact. As the court in *Greely Publishing Co. v. Hergert* admonished, "[c]ounsel are reminded that Rule 11 should never be used as a litigation tactic." 233 F.R.D. 607, 612 (D. Colo. 2006) (citation omitted); *see also Rateree v. Rockett*, 630 F.Supp. 763, 778 n. 26 (N.D. Ill. 1986) ("an improper Rule 11 motion may well call into play the well known legal proposition that people who live in glass houses shouldn't throw stones").

[2] On pages 2-3 of the Tyson Motion, the Tyson Defendants (1) assert as fact that Ms. Marie West -- a disgruntled former employee of the Attorney General's office who brought an employment-related lawsuit (hereafter, the *West* action) -- was asked to engage in misconduct at the behest of the Attorney General's office, and (2) suggest that the Attorney General's office has engaged in efforts at spoliation of evidence. These assertions and suggestions are without any foundation and are highly improper.

First, the allegation by Ms. West that she was asked to engage in misconduct at the behest of the Attorney General's office was raised in pleadings filed in connection with the claims asserted in the *West* action. Significantly, Ms. West's claims against the Attorney General's

See, e.g., Cardenas v. Prudential Insurance Company of America, 2003 WL 23101803, *3 (D. Minn. Dec. 9, 2003) ("The Court should not need to remind parties that neither this Court, nor

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office and Attorney General Edmondson were found to be without merit and dismissed by United States District Judge Ralph G. Thompson on summary judgment, and the case has been administratively closed. *See West v. Burch*, CIV-03-1019-T, W.D. Okla., Apr. 11, 2007 Order (DKT #239), Apr. 4, 2007 Order (DKT #238), May 16, 2006 Order (DKT #245). Despite the fact that this allegation was never proven in the dismissed *West* action, the Tyson Defendants nonetheless present it in their Motion to Compel as fact as opposed to an (unproven) allegation through improper, selective editing of a television transcript. Tyson Motion, p. 2 (omitting phrase "She claims . . . ." from quote of television transcript attached as Exhibit 1 to Tyson Motion). An allegation, particularly an unproven one, is not a fact. For the Tyson Defendants to present it as such in their Motion to Compel is improper.

Second, the Tyson Defendants suggest that the Attorney General's office has engaged in efforts at spoliation of "documents potentially relevant to this case." *See* Tyson Motion, p. 2. As the basis for this unfounded suggestion, the Tyson Defendants cite to a line in a television transcript that plainly refers to a boilerplate provision dealing with the disposition of documents covered by a confidentiality order at the conclusion of a case. Had they taken the time to investigate the facts before making this unfounded suggestion, the Tyson Defendants would have discovered that in the *West* action, an agreed protective order was entered on the motion of the plaintiff, Ms. West, to permit Ms. West to designate as "confidential" her medical, psychological and tax records. *See West*, Dec. 7, 2004 Protective Order, ¶¶ 1 & 8 (DKT #106). The protective order provided for the return to Ms. West of such records at the conclusion of the matter. *See* Protective Order, ¶ 14.

The initial draft of the General Release and Settlement Agreement ("Initial GRSA") with Ms. West contained boilerplate language providing for the return or destruction of documents *produced by Defendants* that had been marked "confidential." *See* Ex. 1 (Initial GRSA, ¶ 12). Such boilerplate is common to protective orders and settlement agreements. *See, e.g.*, Confidentiality Order in *State of Oklahoma v. Tyson Foods, Inc.*, ¶ 9.b. (DKT # 985). However, when Ms. West's counsel asked that the provision be deleted from the Initial GRSA, the State readily agreed. *See* Ex. 2 ("*We accept your proposed changes to the confidentiality provision, but would also be agreeable to removing it altogether*") (emphasis added). Subsequent drafts of the GRSA did not contain this provision. *See, e.g.*, Ex. 3 (Subsequent GRSA, ¶ 12). Thus, the suggestion by the Tyson Defendants that the State has engaged in spoliation of evidence is without any basis whatsoever.

The Tyson Defendants' failure to properly investigate the facts before raising a suggestion that the State has engaged in efforts at spoliation is disturbing and should not be tolerated. A simple phone call to the State's counsel could have confirmed the context of the situation and the fact that Ms. West's allegations were utterly without foundation. However Tyson Defendants, in their unremitting, yet wholly unwarranted, effort to cast the State in a poor light have chosen to jump to unfounded conclusions. Such conduct improperly distracts from the case, causing the Court and litigants to needlessly expend time and resources on irrelevant issues. It needs to stop.

the Magistrate Judge, will tolerate spoliation of evidence, but *neither will it tolerate spurious accusations against members of this Court . . .*") (emphasis added); *Gierbolini Rosa v. Banco Popular de Puerto Rico*, 171 F.R.D. 16, 17 (D.P.R. 1997) ("the court emphasizes that civility in litigation is a value that must be protected and this court will not tolerate rushing imputations of this nature"); *Bauer v. United States*, 40 Fed. Cl. 469, 470 (1998) ("unwarranted accusations will not be tolerated by the court, and will result in sanctions against the offending party . . . . This court expects all participants in litigation before it to comport themselves with courtesy and mutual respect").

In sum, a review by the Tyson Defendants of materials the State has provided in response to discovery would make it readily apparent that the State is in fact providing them with the materials they are entitled to in a timely and organized manner. The Tyson Defendants' repeated unfounded claims of deficiencies in the State's discovery responses are needlessly wasting the Court's, the State's, and indeed, the Tyson Defendants' time -- time that could be better spent preparing the case for trial.

II. Background

The Tyson Defendants assert in their Motion to Compel that the State has not produced any responsive documents and further has dumped voluminous amounts of documents onto the laps of the Poultry Integrator Defendants without sufficient guidance and specificity to identify which documents are responsive to their respective discovery requests. These allegations build upon the unfounded claim brought forth by the Tyson Defendants in response to the Magistrate Judge's question on December 15, 2006,

> THE COURT: Mr. George, are you saying that at this stage of the lawsuit they have never given you a specific location in which they found heightened phosphorus, arsenic, bacteria or hormones?
> MR. GEORGE: That is what I'm saying, Your honor.

Ex. 4 (Dec. 15, 2006 Transcript, 104:2-6). The facts are to the contrary. On several occasions the State has referred the Tyson Defendants to extensive amounts of data showing locations and amounts of pollutants, including in the State's June 15, 2006 response to Cobb-Vantress Interrogatory No. 2 (*see* Tyson Motion, Ex. 2), where the State referred the Defendant Cobb-Vantress to, among other things, USGS data on the internet, an example of which is Exhibit 5. This data shows phosphorus readings for the Illinois River at the USGS Tahlequah monitoring station. Exhibit 5 shows that a vast amount of data is available at various locations on the Illinois River for many constituents and bacteria. Clearly, the Tyson Defendants either are not reviewing the materials being provided or are ignoring the facts contained within those materials.

The fact of the matter is that the State has spent literally hundreds of hours with a team of several lawyers reviewing and organizing its document production to the Poultry Integrator Defendants in order to provide these defendants with sufficient detail to ". . . permit the interrogating party to locate and to identify, *as readily as can the party served*, the records from which the answer may be ascertained." *See* Fed. R. Civ. P. 33(d) (emphasis added). The State has responded to 243 requests for production and 74 interrogatories. An overview of the State's production is warranted to disprove the Tyson Defendants' unfounded and baseless assertion that the State has not provided any responsive information and has essentially dumped documents on them in violation of the Federal Rules.

Approximately nine months ago, on April 28, 2006, the State provided the Poultry Integrator Defendants with a 72-page initial disclosure. The State began a rolling production of documents on June 15, 2005. *See* Ex. 6. The State made additional production of documents

contained within the Rule 26 disclosure on August 8 and 16, 2006. *See* Exs. 7 & 8.[3]

As might be expected, a number of Poultry Integrator Defendants have served discovery requests upon the State in this case. The Tyson Defendants have served interrogatories, as have the Cargill and Simmons Defendants. Cobb-Vantress (a Tyson Defendant), Tyson Foods, Cargill Inc., Cargill Turkey, Simmons, and Peterson have also served requests for production of documents. The State has responded to these various discovery requests. The Poultry Integrator Defendants' discovery requests were very broad and wide ranging, and many of the interrogatories and requests for production of documents overlap.

On September 18, 2006, Defendant Peterson Farms served requests for production of documents covering documents at the Oklahoma Department of Environmental Quality (ODEQ), Oklahoma Conservation Commission (OCC), Oklahoma Water Resources Board (OWRB) and Oklahoma Scenic Rivers Commission (OSRC) and also noticed the deposition of the records custodian at each of these agencies.

In response to the Defendant Peterson Farms' discovery requests and because many of the Poultry Integrator Defendants' discovery requests overlapped, the State began providing responsive documents an agency at a time, to coincide the with the agency document custodian depositions noticed by Defendant Peterson Farms. The State explained this process in an e-mail to the Poultry Integrator Defendants on October 6, 2006:

> I am writing you in connection with the requests for production of documents which you have filed on behalf of your respective clients. Together, these six sets of requests total almost 240 requests, some with several discrete subparts.
>
> Upon review of all of these requests, counsel for the State have

[3] While the Tyson Defendants excoriate the State for its allegedly slow discovery responses, they are quick enough to raise the difficulties of meeting their own obligations and have adopted their own "rolling production" of documents. *See* Ex. 9.

determined the best way to provide you and your clients responsive documents is to schedule onsite inspections, starting with the four agencies from which Peterson has requested documents. We would produce these documents as they are kept in the usual course of business. It may prove that onsite document productions will be needed at other agencies as well. In certain discrete instances, we believe we can organize some responsive documents to correspond with the categories of some requests.

In addition to producing documents responsive to your clients' requests for production, we further intend to make available at each agency the non-privileged documents contained in categories listed in the State's Rule 26(a) disclosures. This will thus provide the Poultry Integrator Defendants the opportunity to inspect and mark for copying a very wide array of relevant documents at a single time.

Given the resources required and the disruption to the agency to respond to your comprehensive requests and to produce the Rule 26(a) documents in such on site inspections, we intend to do only one such inspection per agency, which admittedly might require more than one day. All of the Poultry Integrator Defendants will be invited to attend and examine these documents in a single production to provide all Poultry Integrator Defendants with access and to ensure the agencies' functions are disrupted no more than necessary. We encourage the defendants collectively to provide a team to review documents at each affected agency. We can make arrangements for onsite copying and Bates numbering of documents the Defendants select for copying.

* * *

By a copy of this letter to counsel for the other Poultry Integrator Defendants, I am notifying them that the State will be scheduling these on site document productions. We encourage the defendants to confer among themselves in order to efficiently staff these document productions to meet everyone's needs in the most efficient and economical manner.

We look forward to conferring with you and establishing a reasonable schedule to conclude this discovery on a schedule which meets the needs of all parties.

Ex. 10. ODEQ was selected to be the first production site. On November 22, 2006 the State informed the Poultry Integrator Defendants that, following the deposition of the agency records custodian for the ODEQ, the State would be producing for inspection and copying ODEQ's documents located after a reasonable, good faith search, which were responsive to (1) requests

for production by Poultry Integrator Defendants, (2) interrogatories for which the State had previously indicated it would rely upon documents pursuant to Rule 33(d) for its response, and (3) ODEQ documents identified in the State's Rule 26(a) disclosures. *See* Ex. 11. The State invited all of the Poultry Integrator Defendants to inspect documents together in order to minimize the disruption of the agencies. The State also produced an index of responsive documents at ODEQ, including an index of documents responsive to interrogatories pursuant to Rule 33(d). Ex. 12.

The parties have worked in good faith to accomplish the on site agency document productions. Dates were set for on-site productions at the Oklahoma Department of Environmental Quality (November 28, 2006), Oklahoma Water Resources Board (December 19, 2006), Oklahoma Conservation Commission (January 10, 2007), and Oklahoma Scenic Rivers Commission (February 6, 2007). There, the Tyson Defendants were (or will be) given the opportunity to inspect and select for copying any documents which they wanted from the State's files.

On the dates of the agency on-site productions, the agency documents were pulled and placed in an accessible location for inspection. ODEQ produced 124 boxes of responsive documents. OWRB produced 90 boxes of responsive documents. OCC produced 115 boxes of responsive documents. OSRC is also prepared to produce a substantial number of documents.

At each agency, the documents were boxed and identified by the specific division within the agency from which the documents were pulled. *See* Ex. 13 (Craig Depo., 11:5-12); Ex. 14 (Couch Depo., 10:4 to 18:5). In addition, at each agency production, the State provided a privilege log, as well as a log correlating the agency documents to the specific requests for production and Rule 33(d) document interrogatory responses of the Poultry Integrator

Defendants. *See* Exs. 15 to 17.

Before the on-site inspection and copying by the Poultry Integrator Defendants, the records custodians sat for their depositions. Ms. Craig from ODEQ was questioned for six and one-half hours. Mr. Couch of OWRB was questioned for seven hours. Mr. Pollard and Ms. Phillips from the OCC were questioned for approximately four hours each. The OSRC custodian deposition is scheduled for February 5, 2007. During the depositions, the records custodians pointed out the particular boxes which would contain the documents requested by the Poultry Integrator Defendants. *See, e.g.*, Ex. 14 (Couch Depo., 67:24 to 69:19); Ex. 13 (Craig Depo., 33:12-15). In addition, if asked, the records custodian identified particular documents or categories of documents which were contained in the boxes which were responsive to the requests. *See, e.g.*, Ex. 14 (Couch Depo., 157:8-23); Ex. 13 (Craig Depo., 13:15 to 14:2). In addition to general questions about document production, the custodians were asked about individual requests for production, to which they responded with a specific answer. *See, e.g.*, Ex. 14 (Couch Depo., 22:18 to 24:24); Ex. 13 (Craig Depo., 26:19 to 27:6). Where possible, the custodians identified where individual documents were located within the boxes offered for review. *See, e.g.*, Ex. 13 (Craig Depo., 186:13 to187:4). The Tyson Defendants attended each deposition.

The State has tentatively scheduled February 23, 2007, for the Poultry Integrator Defendants to review documents at the Oklahoma Secretary of the Environment's Office and is in the process of scheduling the Oklahoma Department of Wildlife Conservation and Tourism. The State is also scheduling the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") to supplement the State's previous production of ODAFF documents and to provide all of the Poultry Integrator Defendants an opportunity to review the documents even though

Defendant Peterson Farms had previously inspected and copied documents from that agency.

III. Argument

A. The State's interrogatory answers contain the material facts sought or refer to documents containing those facts.

The Tyson Defendants claim that some of the State's interrogatory responses are incomplete or evasive, *see* Tyson Motion pp. 5-8, listing some interrogatories without further criticism or explanation, and thus leaving the State and the Court to guess why the Tyson Defendants believe the responses are deficient.[4] Consequently, the State cannot make any detailed response to this list, other than to note that two of the interrogatories on this list, Tyson Poultry No. 2 and Tyson Food No. 2, are interrogatories which counsel for the two sides agreed need not be responded to, pending resolution of the State's claim that these Defendants had submitted too many interrogatories or distinct subparts. *See, infra,* III.G. The Tyson Defendants deal substantively only with Tyson Poultry Interrogatories 4-8, which center on the Confined Animal Feeding Operations (CAFO) Act, the Oklahoma Registered Poultry Operations Act, the Agriculture Code, the Environmental Quality Act, and the Administrative Code. In each interrogatory, Tyson Poultry asks for detailed information such as legal provisions violated, date, location and description of each violation, name and address of the grower, and for identification of notices of violations, etc. and for all documents relating to the violation.

In responding to each interrogatory, the State provided a concise narrative of circumstances which give rise to a violation of the particular statutes. Furthermore, pursuant to Rule 33(d), the State agreed to produce documents which provide information about violations of

[4] This practice is contrary to Fed. R. Civ. P. 7(b)(1), which requires a motion to "state with particularity the grounds therefore."

each respective Act.[5] For example, responsive files reflecting violations of the particular statutes (*e.g.*, the Environmental Quality Code or the Agricultural Code) were produced at the ODEQ, the OWRB, and the OCC during on-site agency document productions. During the next inspection of documents at ODAFF, the State will similarly produce any responsive files reflecting violations of the Registered Poultry Feeding Operations Act and the CAFO Act. Additional responsive documents will also be designated. Finally, of course, the State is in the process of gathering evidence of violations of these statutes through its sampling and investigation activities. The State will seasonably supplement its responses with pertinent non-privileged information of such violations. Further, sampling evidence described in the January 5, 2007 Order will be produced on February 1, 2007.

These complaints by the Tyson Defendants highlight two important points about responding to such broad interrogatories. First, interrogatories seeking "all" information, or "every" fact are overly burdensome and oppressive. Second, given the extreme detail requested in the interrogatories on such a broad topic, no completely inclusive narrative answer is possible, and the only way to provide the requested information is through providing documents pursuant to Rule 33(d).

Addressing the first point, it is well established that interrogatories should not require the answering party to provide a narrative account of its case. See *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404 (D. Kan. 1998). Courts will generally find interrogatories overly broad and unduly burdensome on their face to the extent they ask for "every fact" which supports identified allegations, but interrogatories may, however, properly ask for the "principal or material" facts

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[5] By oversight, the Rule 33(d) election was omitted from the Response to Tyson Poultry No. 8 dealing with the Administrative Code. To the extent responsive documents not covered in responses to Nos. 4-7 exist, the State will produce them.

which support an allegation. *Id* at 405 "However, to require specifically 'each and every' fact and application of law to fact . . . would too often require a laborious, time-consuming analysis, search, and description of incidental, secondary, and perhaps irrelevant and trivial details." *Steil v. Humana Kansas City*, 197 F.R.D. 445, 447 (D. Kan. 2000). (internal citation omitted.)

The State has asserted objections that various discovery requests are overly burdensome and oppressive, and the State stands on its objections. Having made substantive and good faith responses to interrogatories and requests for production, the Court should not require more expensive and burdensome responses to the Tyson Defendants' interrogatories. Moreover, it is important to note that even though it objected to producing "every" and "all" documents, the State did not withhold any non-privileged responsive documents on the basis of these objections (which are not waived). In fact, the State produced all non-privileged responsive documents identified to date for the poultry integrator defendants' inspection and copying.

Additionally, the Court needs to be particularly careful about the early use of contention interrogatories of the sort served by the Tyson Defendants. Rule 33(c) allows the court to order "that such interrogatories need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time." Such an order is appropriate in this case, at a minimum to bar compelling more definitive responses, given that the State's narrative responses are accompanied by appropriate Rule 33(d) designations.

Addressing the second point, it is literally impossible to write a narrative response to the sort of detailed interrogatories posed by the Tyson Defendants. Because the Tyson Defendants make extensive inquiries about events, names, dates, locations, and relevant documents on a far-reaching topic, the only sensible and economical way to provide the requested information, in the spirit of Fed. R. Civ. P. 1, is to provide the State's documents containing the requested

information. The State now turns to the Tyson Defendants' arguments regarding the adequacy of the State's Rule 33(d) designations.

B. The State's Rule 33(d) elections are proper and responsive to the interrogatories at issue.

The Tyson Defendants complain that the State has made improper use of Rule 33(d) to provide documents responsive to certain of their interrogatories.[6] *See* Tyson Motion, p. 8. The answer to at least some part each of the interrogatories whose response the Tyson Defendants challenge may be found in the records and documents of the State and its subordinate agencies, with no more burden to the Tyson Defendants than to the State. The following summary of the interrogatories mentioned in the Tyson Motion demonstrates that a reference to business documents is appropriate in each case:

Interrogatory	**Substance of information requested**
Cobb-Vantress 4	Identify all natural resources injured, lost or destroyed.
Cobb-Vantress 5	Identify by name of owner, operator, and address of every parcel of real property State contends is a facility
Cobb-Vantress 8	Identify all assessments, studies or evaluations of environmental or health injuries.
Cobb-Vantress 14	Identify any consents, decrees, agreed orders or settlement agreements and provide names of persons involved, dates and consideration received
Tyson Poultry 1	Identify all efforts or actions taken to identify non-poultry factors having adverse effect on IRW and identify all documents relating to same.
Tyson Poultry 3	Describe actions to manage, address control or reduce entry of constituents into the IRW from non-poultry operations and identify all documents related to same.
Tyson Poultry 4	Specify CAFO act violation by date, location, name and address, identifying notices of violation, warning, complaints, reports, orders, correspondence, photographs, etc. and documents related to same.
Tyson Poultry 5	Identify Registered Poultry Operations Act violations and

[6] The Tyson Defendants have similarly used Rule 33(d). *See, e.g.*, Ex. 18 (Tyson Foods' supplemental interrogatory response invoking Rule 33(d) and promising responsive documents "as they are identified").

	provide date, location, name, address, notices of violations, warnings, complaints, reports, correspondence, photographs, etc. and documents related to same.
Tyson Poultry 6	Identify Agricultural Code violations and provide date, location, name, address notices of violations, warnings, complaints, reports, orders, correspondence, photographs, etc. and documents related to same.
Tyson Poultry 7	Identify Environmental Quality Act violations and provide date, location, name, address, notices, warnings, complaints, reports, correspondence, photographs, etc. and documents related to same.
Tyson Chicken 2	Identify all reports studies, publications, research, sampling or monitoring data demonstrating IRW contaminated by copper.
Tyson Chicken 5	Identify all reports, studies, publications, research, modeling, sampling or monitoring data assessing relative contributions of any or all defendants to injury caused by constituents.
Tyson Chicken 6	Identify all reports, studies, publications, research, sampling or monitoring data establishing adverse impact on water bodies in the IRW as a result of release of phosphorus or phosphorus compounds
Tyson Chicken 10	Identify all reports, studies, publications, research, sampling data or monitoring data establishing adverse impact on water bodies in the IRW as a result of the release of cooper or cooper compounds
Tyson Foods 3	Identify each tract of real property in the IRW which the State owns, or has owned during the three years prior to filing.
Tyson Foods 4	Identify specific chemicals, etc. collected, handled, treated, stored, or disposed of by chemical, volume, and processes employed on State land and identify all documents related to same.
Tyson Foods 5	Identify every potential source of constituents in the IRW from non-poultry sources by location, owner or operator, substance released, pathway, etc. and identify all documents related to same.
Tyson Foods 6	Identify all permits, licenses, government authorizations authorizing handling, treatment, storage, use or disposal of chemicals, etc. believed to include constituents, identifying permit holders by name, location, permit or license number, date, etc. and identify all documents related to same.
Tyson Foods 7	Describe all evidence and identify all documents that Tyson Defendants caused release of hazardous substance into water bodies of the IRW and identify each release by substance, location, source, volume, time, owner or operator, generator, transport mechanism and pathway.
Tyson Foods 8	Describe all activities to investigate, etc., water in the IRW, contaminant loading, condition of water, and identify all

	persons, agencies, with knowledge of same and for each activity state actions taken, time period, objections, funding, conclusions, observations or recommendations, and identify all documents related to same.
Tyson Foods 11	Describe all evidence and identify all documents supporting allegations of imminent and substantial endangerment to the environment in the IRW and for each such action identify specific conduct and describe the endangerment.

The State has organized and specified responsive documents in each of its agency document productions, and has not left the Tyson Defendants to search through the hundreds of boxes produced without specific direction and guidance. *See, e.g.*, Exs. 15 through 17. In every instance, a lawyer for the State has been available to assist, and the Poultry Integrator Defendants have deposed the document custodian. Such focused production complies with the requirements of Rule 33(d) because it provides sufficient detail to permit interrogating party to identify readily individual documents from which answer may be ascertained. *American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 109 F.R.D. 263 (E.D.N.C. 1985).

The Tyson Defendants argue that the instant case is similar to a 1977 District of South Carolina decision, *Equal Employment Opportunity Commission v. Anchor Continental*, Inc., 74 F.R.D. 523 (D.S.C. 1977). The situation in *Anchor* was very different from this case. In *Anchor*, an employment discrimination case brought by the EEOC, the EEOC offered to produce portions of its file in response to a number of contention interrogatories, the defendant refused the tender of documents, and the court reviewed the file contents in camera. *Id.* at 526. Upon reviewing the documents, the court concluded that the EEOC was trying to hide behind its Rule 33(c) option to produce business records, and its claims of executive privilege and attorney work product, because the documents reviewed by the court included multiple statements by EEOC employees about the weaknesses of the claims in the case. The court held the EEOC was required to answer the contention interrogatories without reliance on a Rule 33(c) reference to

business records because the documents produced did not provide answers to the factual inquiries. *Id.* at 529.

In this case, the documents that have been produced to the Tyson Defendants are in fact responsive to their interrogatories and provide significant amounts of relevant, factual information. In addition to producing business records that contain factual information sought by the Tyson Defendants, the State also provided an index that provides a detailed roadmap to the production of documents and links each interrogatory to the appropriate location in the production in which to find the responsive documents. Furthermore, an additional production of extensive factual information is being produced on February 1, 2007 that is responsive to these requests. Unlike the EEOC in *Anchor*, the State is working hard to produce the factual information that supports its case and that responds to the contention interrogatories, and it is by no means attempting to hide information from the Tyson Defendants.

C. The Tyson Defendants' contention interrogatories requested identification of documents.

The Tyson Defendants complain that the State has improperly used Rule 33(d) elections to respond to contention interrogatories, which "seek . . . the facts *or documents* which they intend to use to support their claims." Tyson Motion, p. 11 (emphasis added). It is puzzling to be criticized for producing documents via Rule 33(d) when the very interrogatories seek identification of such documents. Each of the interrogatory responses complained about either explicitly asks for the identification of documents, or asks for information readily ascertainable from the State's records. The interrogatories complained of (Tyson Motion, pp. 11-12) may be summarized as follows:

Interrogatory	**Substance of information requested**
Tyson Chicken 2	Identify all reports studies, publications, research, sampling or

	monitoring data demonstrating IRW contaminated by copper
Tyson Chicken 6	Identify all reports, studies, publications, research, sampling or monitoring data establishing adverse impact on water bodies in the IRW as a result of release of phosphorus or phosphorus compounds
Tyson Chicken 10	Identify all reports, studies, publications, research, sampling data or monitoring data establishing adverse impact on water bodies in the IRW as a result of the release of copper or copper compounds
Cobb-Vantress 4	Identify all natural resources injured, lost or destroyed.
Cobb-Vantress 5	Identify by name of owner, operator, and address of every parcel of real property State contends is a facility
Tyson Poultry 4	Specify CAFO act violation by date, location, name and address, identifying notices of violation, warning, complaints, reports, orders, correspondence, photographs, etc. and documents related to same.
Tyson Poultry 5	Identify Registered Poultry Operations Act violations and provide date, location, name, address, notices of violations, warnings, complaints, reports, correspondence, photographs, etc. and documents related to same.
Tyson Poultry 6	Identify Agricultural Code violations and provide date, location, name, address notices of violations, warnings, complaints, reports, orders, correspondence, photographs, etc. and documents related to same.
Tyson Poultry 7	Identify Environmental Quality Act violations and provide date, location, name, address, notices, warnings, complaints, reports, correspondence, photographs, etc. and documents related to same.
Tyson Poultry 8	Identify Administrative Code violations and provide date, location, description, name, address, notices of violations, warning, complaints, reports, orders, correspondence, etc., and documents related to same.
Tyson Chicken 2	Identify all reports studies, publications, research, sampling or monitoring data demonstrating IRW contaminated by copper.
Tyson Chicken 6	Identify all reports, studies, publications, research, sampling or monitoring data establishing adverse impact on water bodies in the IRW as a result of release of phosphorus or phosphorus compounds
Tyson Chicken 10	Identify all reports, studies, publications, research, sampling data or monitoring data establishing adverse impact on water bodies in the IRW as a result of the release of cooper or cooper compounds
Tyson Foods 11	Describe all evidence and identify all documents supporting allegations of imminent and substantial endangerment to the environment in the IRW and for each such action identify specific conduct and describe the endangerment.

Contrary to the Tyson Defendants' suggestion, the State is referring them to documents pursuant to Rule 33(d) because such documents reveal the information called for, or because they asked for supporting documents, and not to require them to puzzle out the State's claims by reference to documents alone.

D. The State has properly identified the location of documents for which it has invoked Rule 33(d) in order to respond to interrogatories.

The Tyson Defendants resort to semantic quibbling with their complaint that the States Rule 33(d) designations are "Non-Committal." *See* Tyson Motion, pp. 12-13. As explained above, and illustrated in Exhibits 15 through 17, at each state agency document production the State provided an index showing for which interrogatories and requests for production documents were contained in each box. The accompanying letter or explanation said particular responsive documents "may be found" in each box, rather than that responsive documents "will be found" in the box. This is an immaterial semantic distinction because the indicated responsive documents were in the boxes indicated, and the Tyson Defendants make no argument to the contrary.

The Poultry Integrator Defendants, including the Tyson Defendants, have attended three agency document productions and the depositions of the corresponding document custodians. The Tyson Defendants have had the opportunity to inspect, and have copied their selections from, hundreds of boxes of documents using the indices provided by the State. As highly motivated as the Tyson Defendants apparently are to find fault with the State, if the responsive documents were not in the indicated boxes, the Tyson Defendants presumably would have said so. They have not. The State has conscientiously fulfilled its obligations.

E. The State's document production indices meet the requirements of Rule 33(d) for specificity.

At each of the three on site state agency document productions conducted to date, the State has provided the Poultry Integrator Defendants with an index showing, by box of documents, which interrogatories and requests for production were responded to. Many of the interrogatories and requests for production are quite broad, and overlap one another. Consequently, documents in a particular box often respond to several interrogatories or requests for production. This is not the fault of the State, but is caused by the multiple, very broad and overlapping discovery requests submitted by the Poultry Integrator Defendants.

The State went to considerable effort to pull together responsive documents and prepare indices for the guidance of the Poultry Integrator Defendants. At the time the Poultry Integrator Defendants selected responsive documents for copying at the three agencies so far completed, "the burden of deriving or ascertaining the answer [was] substantially the same for the party serving the interrogatory as for the party served." *See* Fed. R. Civ. P. 33(d). The Poultry Integrator Defendants' have selected responsive documents for copying at those three agencies, ensuring that, if the State overlooked a responsive designation, they would nonetheless have an opportunity to find the responsive document.

F. Tyson's assault on the work product doctrine is unfounded.

Even though the Tyson Defendants have themselves invoked work product protection in their responses to the State's discovery,[7] they continue their attack against the State's invocation of that protection. The Tyson Defendants offer no principled reason why their frequent invocation of these privileges is proper while the State's is "contemptuous." *See* Tyson Motion,

[7] Tyson Foods' objects to providing similar information prepared in anticipation of litigation based on the work product doctrine. *See, e.g.* Exs. 18 and 19.

p. 19. Putting aside the hypocrisy of the Tyson Defendants' position, their complaints are unfounded.

The Tyson Defendants make only two particularized challenges to the State's invocation of the work product and expert opinion protections, raise no question whatsoever about the adequacy of the State's privilege log or any item on it, and then summarily suggest the Court sweep aside all of the State's invocation of privilege and order the State "fully to respond to all 46 interrogatories." The State responds below to the specific challenges raised by the Tyson Defendants.

The Tyson Defendants' first substantive complaint pertains to the State's test data and photographs. *See* Tyson Motion, p. 18. This complaint merely rehashes issues already resolved by the State's December 15, 2006 offer to produce its sampling data and the Court's subsequent order for it to do so. On February 1, 2007, the State will make disclosure of those materials it previously promised, and which were ordered released by the Court. The Tyson Defendants make no other particularized complaint about disclosure of test results to which the State can respond.

The Tyson Defendants' second substantive complaint involves the State's Rule 26(a) disclosures, particularly focusing on the State's invocation of work product protection regarding its development of its damages case. *See* Tyson Motion, p. 18-19. The Tyson Defendants also complain about the invocation of work product protection for damage computation in response to two of its interrogatories. Invocation of the work product and expert opinion provisions of Rule 26 are entirely appropriate in this context. This is not a simple automobile accident case. The State cannot take its polluted Scenic River to a body shop for an estimate of damages. The State can and is consulting with experts to analyze those measures best suited to address the

environmental damage done by poultry waste from the Poultry Integrator Defendants, including the Tyson Defendants. That work is protected by the work product doctrine. *See* Rule 26(b)(4)(B). The work of these experts will be disclosed in a timely fashion and in accordance with a scheduling order in the reports of the State's testifying experts. The Poultry Integrator Defendants will have adequate opportunity to depose the State's damage experts and determine the basis for their opinions as to damages, all in keeping with the procedures set forth in Rule 26.

The Tyson Defendants' two substantive challenges to the State's interrogatory responses are without merit, and the balance of their arguments, untethered to any particularized issue, are pointless. The Tyson Defendants *are* trying to jump start expert discovery, contrary to the plain language of Rule 26(b)(4)(B) which states:

> (B) A party may, through interrogatories or by deposition, discover *facts known* or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial *only*...upon a showing of *exceptional circumstances* under which it is *impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means*.

(Emphasis added.) The Tyson Defendants' attempt to distinguish between "facts known" and opinions of expert consultants crashes on the plain language of Rule 26(b)(4)(B), which unambiguously protects "facts known" by such expert consultants. This is undoubtedly the basis for the Tyson Defendants' own invocation of protection for "information" prepared in anticipation of litigation. *See, e.g.*, Exhibits 18 and 19 and footnote 7 above. Further, since this issue has previously been briefed extensively, the State reincorporates the arguments and authorities in its Response to the earlier Cobb-Vantress Motion to Compel (Dkt. Nos. 799 & 880).

The Tyson Defendants fail to articulate any specific item they seek which will not be provided in the production on February 1, 2007, and fail to meet their obligations under Rule

26(b)(4)(B) to articulate the required exceptional circumstances. The Court should deny this unsupported request to invade the trial preparation of the State.

G. The number of interrogatories (including subparts) exceeds the number permitted by the Federal Rules and Local Rules and are therefore objectionable.

The Federal Rules and Local Rules set limits on the number of interrogatories (including subparts) that a party may serve. The State brought to the Tyson Defendants' attention the fact that certain of their sets of interrogatories exceeded the number of permissible interrogatories (including subparts).[8] Accordingly, in May 2006, counsel for the State and for the Tyson

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[8] For example, Tyson Poultry interrogatory no. 3 clearly contains multiple, separate questions:

> INTERROGATORY NO. 3: Please describe in detail all actions taken and practices employed by You to manage, address, control or reduce the entry of phosphorus/phosphorus compounds, nitrogen/nitrogen compounds, arsenic/arsenic compounds, zinc/zinc compounds, cooper/cooper [sic] compounds, hormones or microbial pathogens into the IRW from activities of persons, Entities and industries other than poultry operations (including, but not limited to, cattle operations, hay operations, septic tanks, commercial fertilizer applications, mining, municipal POTW discharges, land application of biosolids and utilization of herbicides and pesticides). Also, please Identify all Documents Related to such actions.

First, the interrogatory asks for "all actions taken *and* practices employed by" the State to "manage, address, control or reduce" multiple constituents. "Actions taken" and "practices employed by" are separate and discrete. "Actions taken" may be enforcement proceedings. "Practices employed by" may be restorative projects. It is clear that these are discrete and separate questions. Likewise, "manage," "address," "reduce," and "control," are separate actions which involve very different types of responses by the State. Additionally, the interrogatory sets forth seven separate constituents which Tyson Poultry is requesting that the State identify the "actions taken and practices employed" to "manage, address, control or reduce" each constituent. Finally, the interrogatory asks for supporting documents. Each of these subparts is logically separate and independent from the others. Thus, the interrogatory contains as few as eight (seven constituents and documents) or as many as forty-eight (actions and practices to manage, address, control or reduce seven separate constituents and the supporting documents). Further, Interrogatory No. 3 suggests nine separate entities and industries from which the State should gather the information. Clearly, this interrogatory inquires as to more than "the existence, location and custodian of documents or physical evidence" as set forth in LCvR 33.1.

Defendants conferred about this matter and reached a stand-still agreement preserving the respective positions of both sides and allowing the State, for the time being, not to answer Tyson Poultry No. 2, Tyson Foods Nos. 2 (which substantially duplicates Cobb-Vantress No. 10) and 9 and Cobb-Vantress No. 10, subject to the respective Tyson Defendants' ability later to move to compel and challenge the State's count of discrete subparts. *See* Exs. 20 (e-mail between counsel memorializing agreement) and Ex. 21 (chart showing number of discrete subparts propounded by each Tyson Defendant). This stand-still agreement between the parties remained in place until the Tyson Defendants filed their motion to compel.

The State recognizes that the "interrogatory count" issue has been the subject of a previous dispute between the State and the Cargill Defendants, and incorporates that briefing herein. The State further firmly believes that the Tyson Defendants have exceeded the number of permissible interrogatories (including subparts). *See* LCvR 33.1 and footnote 8. However, in an effort to keep the case moving, and without waiving its right to object to the service of any further interrogatories on the ground that they exceed the number of permissible interrogatories (including subparts), the State agrees to amend its responses and objections as to these four interrogatories within 30 days: (1) to withdraw its objection that the number of interrogatories (including subparts) has been exceeded and (2) to make appropriate responses under Federal Rules in light of the withdrawals of that objection.

IV. Conclusion

WHEREFORE, premises considered, Oklahoma respectfully requests that this Court deny the Tyson Defendants' Motion to Compel.

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